

48A C.J.S. Judges § 243

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

IX. Disqualification to Act

B. Waiver of Disqualification

2. Acts Constituting Waiver

§ 243. Consent

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  54

Whether the disqualification of a judge can be waived by consent depends on the language of the constitutional or statutory provisions involved or on the nature of the disqualification.

While at common law, the objection to a disqualified judge may be waived by the consent of the parties,¹ whether or not the disqualification of a judge may be waived by consent ordinarily is dependent on the language of the constitutional or statutory provisions involved or on the nature of the disqualification.² If the disqualification goes to the judge's power to act, and the judge's acts are absolutely void or without jurisdiction,³ as where there is an absolute prohibition in the constitution or statute against such a judge sitting in the case,⁴ then the disqualification cannot be waived by the consent of the parties. Under a federal statute, a justice, judge, or magistrate judge may not accept from the parties to a proceeding a waiver of any particular specified grounds for disqualification.⁵

On the other hand, if the acts of the disqualified judge are considered voidable rather than void,⁶ or if the disqualification is based on a statutory provision which is a disqualification provision and not one creating a jurisdictional infirmity,⁷ the disqualification may be waived by the consent of the parties. If the disqualification is created by statute, it is within the power of the legislature to provide that it may be waived by the consent of the parties,⁸ and some statutes⁹ and court rules¹⁰ thus provide for a waiver of disqualification by consent. For instance, under some statutes, the rule governing the disability of a judge communicates a positive prohibition on the substitution of a judge prior to verdict unless all parties stipulate their consent.¹¹ Under other statutes, only some of the disqualifications of judges may be waived by the consent of the party, and in such a case, only such disqualifications as the statute contemplates may be waived.¹²

Attorneys' oral waiver of the requirements of a statute pertaining to the remittal of the disqualification of a judge is insufficient to allow the judge to continue hearing the case where the requirements of statute, that a written waiver be made by each party and each attorney, are not met.¹³

Judicial discretion.

Generally, it is within the judge's discretion to accept a waiver by consent.¹⁴

Consent after objection.

A peremptory challenge to a judge, once exercised, may be set aside by agreement of the parties.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Defendant who pled guilty to sexual battery waived any requirement that sentencing judge recuse himself on the ground that he was an assistant district attorney at the time defendant was indicted, where judge informed defendant at the plea hearing that he had been an assistant district attorney at the time but that he had not worked on the case, judge informed defendant that there were three other judges who could preside if defendant preferred and offered defendant additional time to discuss the issue with counsel, and defendant stated that he wished to go forward with his plea. [Wright v. State](#), 228 So. 3d 915 (Miss. Ct. App. 2017), cert. denied, 223 So. 3d 788 (Miss. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ark.—[Campbell v. State](#), 281 Ark. 13, 660 S.W.2d 926 (1983).
Ohio—[State v. Keene](#), 81 Ohio St. 3d 646, 1998-Ohio-342, 693 N.E.2d 246 (1998).
- 2 U.S.—[Matter of Andros Compania Maritima, S.A. \(Marc Rich & Co., A.G.\)](#), 579 F.2d 691 (2d Cir. 1978).
Tex.—[Lane v. State](#), 634 S.W.2d 65 (Tex. App. Fort Worth 1982).
- 3 Tex.—[Cain v. Franklin](#), 476 S.W.2d 952 (Tex. Civ. App. Austin 1972), writ refused n.r.e., (May 24, 1972).
- 4 U.S.—[U.S. v. Pepper & Potter, Inc.](#), 677 F. Supp. 123 (E.D. N.Y. 1988).
Tex.—[Gamez v. State](#), 737 S.W.2d 315 (Tex. Crim. App. 1987).
- 5 28 U.S.C.A. § 455(e), referring to 28 U.S.C.A. § 455(b).
Asking parties if they want to disqualify precluded
U.S.—[Matter of Andros Compania Maritima, S.A. \(Marc Rich & Co., A.G.\)](#), 579 F.2d 691 (2d Cir. 1978).

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Construction and application of 28 U.S.C.A. sec. 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned, 40 A.L.R. Fed. 954.

6 Ind.—Singleton v. State, 173 Ind. App. 606, 364 N.E.2d 1041 (1977).

7 Conn.—State v. De Gennaro, 147 Conn. 296, 160 A.2d 480 (1960).

8 Cal.—Caminetti v. Pacific Mut. Life Ins. Co. of Cal., 22 Cal. 2d 386, 139 P.2d 930 (1943).

9 U.S.—U.S. v. Conforte, 457 F. Supp. 641 (D. Nev. 1978), judgment aff'd, 624 F.2d 869 (9th Cir. 1980).

Okla.—Doss v. State, 1992 OK CR 15, 829 P.2d 45 (Okla. Crim. App. 1992).

10 Ind.—Maneikis v. State, 411 N.E.2d 669 (Ind. Ct. App. 1980).

11 U.S.—Whalen v. Ford Motor Credit Co., 684 F.2d 272, 32 Fed. R. Serv. 2d 678, 34 Fed. R. Serv. 2d 417 (4th Cir. 1982).

12 U.S.—Matter of Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.), 579 F.2d 691 (2d Cir. 1978).

13 Ill.—Woods v. Durkin, 183 Ill. App. 3d 870, 132 Ill. Dec. 357, 539 N.E.2d 920 (3d Dist. 1989).

14 U.S.—U.S. v. Conforte, 457 F. Supp. 641 (D. Nev. 1978), judgment aff'd, 624 F.2d 869 (9th Cir. 1980).

15 Alaska—Padie v. State, 566 P.2d 1024 (Alaska 1977).

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